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FACSIMILE TRANSMITTAL SHEET

To: Ms. Terry Mutchler, Executive Director, Office of Open Records
 Ms. Lucinda Glinn, Esquire

From: M. Joseph Clement, Esquire

Re: Mollick v. Worcester Twp. OOR Dkt. No. AP 2010-0863

Date: November 22, 2010

FAX NUMBER TRANSMITTED 717-425-5343
TO:

DOCUMENTS	NUMBER OF PAGES
Motion for Reconsideration	8 (including cover)
Message: Enclosed please find the Township's Motion for Reconsideration in the above captioned matter, a copy of which has been sent via first class mail to Dr .Mollick.	

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Attorney for Respondent/Appellee

WORCESTER TOWNSHIP
1721 Valley Forge Road
Worcester, Pennsylvania 19490

: IN THE PENNSYLVANIA OFFICE OF OPEN
: RECORDS

Appellee/Respondent

v.

: Dkt. No. AP 2010-0863

JAMES MOLLICK
2114 Country View Lane
Lansdale, Pennsylvania 19446

Appellant/Requester

WORCESTER TOWNSHIP'S PETITION FOR RECONSIDERATION OF THE
FINAL DETERMINATION

On November 5, 2010, Office of Open Records Appeals Officer Lucinda Glimm, Esquire, (the "Appeals Officer") issued a Final Determination in the above captioned matter. The Appeals Officer concluded that Worcester Township (the "Township") must disclose a certain email (the "Email") to the Requester, James Mollick.

The Township asserted that the Requester's Right-to-Know Law request (the "Request") was disruptive and, therefore, should be denied. The Township also argued that the Email is protected from disclosure by the attorney client privilege.

It is undisputed that the Email was: (a) sent to one current Township Supervisor (Mr. Bustard) and one former Township Supervisor (Mr. Harris); (b) pertaining entirely to matters which occurred when the ex-Supervisor was in office; and, (c) entirely related to pending or impending litigation.

I. Attorney-Client Privilege.

In reaching the Final Determination, the Appeals Officer reversed her own determination at OOR Dkt. No. AP 2010-0557 (holding that the Email was protected from disclosure by the attorney-client privilege). Ms. Glinn reasoned (in the current appeal) that in the appeal at OOR Dkt. No. AP 2010-0557, the Township failed to disclose that Mr. Harris was an ex-Township Supervisor at the time the Email was sent and determined that “had the status of Harris as a non-client and non-Supervisor been clear, the OOR would not have upheld the exemption of the e-mail as privileged.” *Mollick v. Worcester Twp.*, OOR Dkt. No. AP 2010-0863 at p. 8.

The Appeals Officer’s reasoning is contradictory to the affidavit of Township Solicitor James J. Garrity in *Mollick v. Worcester Twp.*, OOR Dkt. No. AP 2010-0863. In paragraph (d) of Solicitor Garrity’s affidavit, the Email is clearly identified as “an email sent on February 15, 2010 from Solicitor Garrity to Supervisor Bustard and ex-Supervisor Harris.” A copy of the affidavit is attached hereto and incorporated herein as Exhibit “A”. Clearly, the OOR was aware that the email was sent (in part) to a ex-Supervisor when the finding of the attorney-client privilege was made in OOR Dkt. No. AP 2010-0557

In the Final Determination of the present matter, however, the Appeals Officer reversed the finding of attorney-client privilege as to the exact same email and instead reasons (apparently without exception) that “when an employee or official leaves a local agency, the client relationship no longer exists, and an element of the attorney client-privilege is absent.”

It is respectfully submitted that any reasoning, which assumes that no former client is ever entitled to the benefit of the attorney-client privilege, simply ignores the reality of litigation or inquiry after the term of office of an elected or appointed official and completely destroys the very purpose of this important privilege.

A former Supervisor remains a client of the Township Solicitor with respect to matters that occurred during the Supervisors term(s) of office. In fact, a township solicitor is required by statute to defend any township officer (not just officers currently in office). 53 P.S. 66101; see also: *Silver v. Downs*, 493 Pa. 50, 425 A.2d 359 (1981);

Syms v. Lower Southampton Township, 702 A.2d 885 (Pa. Cmwlth. 1997); and, *Mayor Edward Thomas v. Borough of Trumbauersville*, 740 A.2d 315; (Pa. Cmwlth. 1999).

Moreover, even if the Appeals Officer's reasoning was a correct recitation of the elements of the attorney-client privilege, our Courts have consistently held that communications with former clients which occur, after the conclusion of the attorney client relationship, but which relate entirely to events that occurred while the former client was a client, are attorney-client privileged. See e.g.: *In re: Flonase Antitrust Litigation*, 2010 U.S. Dist. Lexis 65584 (E.D. Pa. 2010) (holding an entity that is a party to a dispute may claim attorney-client privilege for communications made to former employees after the termination of their employment when those communications concern matters within the scope of his/her former responsibilities). *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC.*, 2004 U.S. Dist. Lexis 23431 (E.D. Pa 2004); and, *In re: Investigating Grand Jury; Appeal of: Samuel C. Stretton, Esquire*, 2005 PA Super 369; 887 A.2d 257 (Pa. Super. 2005). In essence, a former Township Supervisor shall always remain a client of the Township Solicitor as to matters which occurred while that Supervisor was in office. Any holding otherwise elevates form over substance and voids the privilege rightfully extended to any person in public office.

II. Disruptive Request.

The Appeals Officer found that requests number 5 and 6 were not disruptive. The Township strongly disagrees.

"An agency may deny a requester access to a record if the requester has made repeated requests for the same record and the repeated requests place an unreasonable burden on the agency." RTKL §506(a)(1). Words and phrases in a statute "shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa.C.S.A. § 1903.

The Appeals Officer in this case reasoned that the while the Township showed that the "numerosity and complexity of the Requester's requests place an unreasonable burden, financial and logistical, on the Township. . .the Township must also show that the requests are made for the same records" (emphasis added). Thus, the Appeals Officer's reasoning appears to require that multiple, absolutely identical requests must be made for the same record in order for a request to be found disruptive.

Nothing in the RTKL requires the requests to be identical. To require identical requests would contort the words of the RTKL to require an element that is clearly not required by the plain meaning of the words in the RTKL. Moreover, according to the Appeal's Officer's reasoning, by changing just one or two words in a request or using slightly different language or dates to describe the same records (as this particular Requester frequently does) the requests are somehow essentially different. It is undisputed that the Email (which was sent to a former and a current Supervisor) is potentially responsive to over 20 separate RTKL requests of the Requester. In fact, the series of individual requests at this OOR docket number basically request the same email 18 different ways!

The Appeals Officer further reasons that the Requester's multiple requests are somehow different because, although there are innumerable prior requests related to the "Susan Caughlan Driveway Issue," requests 5 and 6 (which are the subject of this appeal) are somehow different because they "seek e-mails from Harris about Township business generally in addition to the previously requested subjects." (emphasis added). The Appeals Officer also suggests that requests 5 and 6 seek email to former Supervisor Harris after the term of his office had expired whereas the requester's prior requests sought emails to or from Supervisors while in office. This reasoning simply ignores the numerous requests made for the same records without regard to whether or not Mr. Harris was a current Supervisor or ex-Supervisor at the time the requests were made (see e.g. Requests 7, 8, and 9 submitted under cover of the same RTKL form as Requests No. 5 and 6).

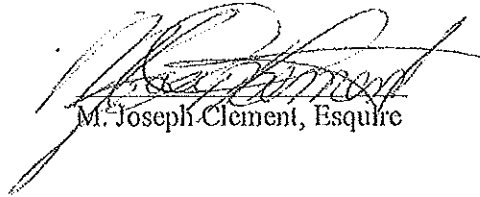
As this Requester well knows, the potentially responsive email on this subject matter to or from ex-Supervisor Harris (and responsive to approximately 12 or 13 of the 18 requests submitted under cover of a single RTKL request form) is the Email which has been repeatedly denied to the Requester in the past and found to be attorney-client privileged by the OOR after confirmation that the email was sent to a current and an ex-Supervisor.

For at least the foregoing reasons, the Township respectfully requests that the Final Determination at OOR Dkt No. 2010-0863 be reconsidered and reversed thereby

finding the Requester's requests to be intentionally disruptive or, in the alternative, finding the attorney-client privilege to protect the Email from disclosure.

Respectfully Submitted,

Wisler Pearlstine, LLP.



M. Joseph Clement, Esquire

PENNSYLVANIA OFFICE OF :
 : DOCKET NO. 2010-0863
 OPEN RECORDS :

AFFIDAVIT

I, James J. Garrity, Esquire, hereby being duly sworn according to law, do hereby depose and say as follows:

- a. I am the Solicitor for Worcester Township ("Township").
- b. By way of a letter dated August 30, 2010 ("Response") the Township Open Records Officer denied all eighteen (18) of Mollick's July 22, 2010 Right-to-Know Law ("RTKL") requests ("Requests").
- c. On or about September 21, 2010, Mollick appealed the Township's denial of requests 1, 5, 6, 7, 8, and 9 of the Requests to the Pennsylvania Office of Open Records ("OOR").
- d. The RTKL imposes an affirmative duty upon a local agency to make a "good faith effort" to determine "whether the agency has possession, custody or control of the identified record". 65 Pa.C.S. §901. To the best of my knowledge, the Township made such a good faith effort in this case.
- e. Searches of the relevant Township sponsored email accounts revealed a single email that may potentially be responsive to requests 1, 5, 6, 7, 8, or 9 of Request: an email sent on February 15, 2010 from Solicitor Garrity to Supervisor Bustard and ex-Supervisor Harris (the "Email"). The Email was not produced since the OOR has previously found it to be protected by the attorney-client privilege in *Mollick v. Worcester Twp.*, OOR Dkt. No. AP 2010-0557
- f. Mollick has made at least twenty-four (24) RTKL requests to which the Email is potentially responsive.
- g. Based upon information received from Township staff, it appears that the Township will be billed a total of \$23,575.50 for legal services associated with responding to Mollick's various RTKL requests and appeals of the Township's responses to those requests (including the 24 requests for the Email) from February 22, 2010 to October 1, 2010.

h. The Email is privileged (and has been held to be privileged by the OOR) and neither the Township nor the Solicitor has waived the privilege.

i. The February 15, 2010 email from Solicitor Garrity to Supervisors Bustard and ex-Supervisor Harris pertains entirely to potential/pending/impending litigation regarding appeal issues raised by the OOR's final determination at OOR Dkt. No. AP 2009-1064.

j. The underlying subject matter of the potential/pending/impending litigation regarding appeal issues raised by the OOR's final determination at OOR Dkt. No. AP 2009-1064, relate to events that transpired during ex-Supervisor Harris's tenure as a Township Supervisor.

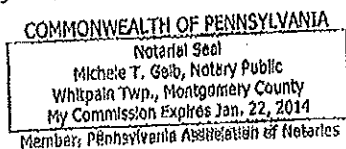
k. The OOR has already concluded that the Township properly withheld the Email from disclosure because it contains communications to a client regarding requests for legal advice and matters which either: (a) could result in litigation; or, (b) include the mental impressions, conclusions, opinions, legal theories, legal research, strategy and work product of the Township Solicitor, or that of his associates or partners.

l. The above referenced facts are true and correct to the best of my knowledge, information and belief

James J. Garrity
James J. Garrity, Esquire

Sworn and Subscribed
before me this 1st day
of October, 2010.

Michele G. Gelb
Notary Public





November 29, 2010

M. Joseph Clement
Wisler Pearlstine, LLP
Office Court at Walton Point
484 Norristown Road
Blue Bell, PA 19422

RE: Petition for Reconsideration received November 23, 2010, OOR Dkt. AP 2010-0863

Dear Mr. Clement:

We are in receipt of your Request for Reconsideration received in connection with the Office of Open Records Final Determination in *Mollick v. Worcester Township*, OOR Dkt. AP 2010-0863. We hereby grant your Request.

We note here that in the absence of applicable Office of Open Records interim regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

We also note that the Requester, James Mollick, may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration on or by December 14, 2010.

This office will issue a determination responsive to this Petition for Reconsideration no later than 30 days from the date your Petition was filed (November 23, 2010) or by December 23, 2010.

Please contact me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathanael J. Byerly", is written over the typed name and title.

Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
James Mollick